◦ THE HON'BLE SRI JUSTICE BILAL NAZKI

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AND

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THE HON'BLE SRI JUSTICE S.ANANDA REDDY

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+ W.P.Nos. 23910 & 24690 of 2005

% Dated 01.02.2006

Makemalla Sailoo

….Petitioner

Vs.

$ The Superintendent of Police, Nalgonda Dist. & others

….Respondents

! Counsel for petitioner: Mr. Santhapur Satyanarayana

Ms. A. Jayanthi,

^Counsel for Respondents: Advocate General,

<GIST:

> HEAD NOTE:

? Cases referred

1. AIR 1978 SC 1351;
2. AIR 1984 KARNATAKA 112;

HON'BLE Mr. JUSTICE BILAL NAZKI

AND

HON'BLE Mr. JUSTICE S.ANANDA REDDY

W.P.NOs. 23910 & 24690 of 2005

Dt. 1.2.2006

Between:

Makemalla Sailoo

…Petitioner

and

The Superintendent of Police, Nalgonda Dist. & others

…Respondents

HON'BLE Mr. JUSTICE BILAL NAZKI

AND

HON'BLE Mr. JUSTICE S.ANANDA REDDY

W.P.NOs. 23910 & 24690 of 2005

COMMON JUDGMENT: (Per Hon'ble Mr. Justice Bilal Nazki)

WP NO.23910 OF 2005:

This is an unusual case in which a girl of 13 years claims to have married 3rd respondent. The petitioner is the father of the girl viz., Arpitha who was a student of 7th class. He contended in this writ petition that while he was sleeping out side his residence, on 26.4.2005, the 3rd respondent took away his minor daughter, then he lodged a complaint with the police. The complaint was registered on 4.6.2005 as Cr.No. 116 of 2005 under Section 366 r/w. 109 IPC. The police could not trace out the girl. Therefore the writ petiton was filed

on 7.11.2005. According to certificate, her date of birth is 12.9.1993.

Counter affidavit was filed by 2nd respondent in which it is admitted that the report had been filed. It is stated that on 11.11.2005 the police got information that the alleged detenue and the accused were staying in Chennai. A police team went there and traced the alleged detenue and the accused. Their statements were recorded. The accused in his statement stated that he married one Laxmi two years back against his will. Subsequently he developed relationship with the alleged detenue and eloped with her on 26.4.2005. The police claimed that in the statement under Section 161 Cr.P.C. the alleged detenue stated that she was induced by the accused to run away with him. They were brought to Devarakonda on 12.11.2005 and produced before the Magistrate. The alleged detenue refused to go with her parents, therefore the Magistrate sent her to State Home for Child Care Centre, Nimboli Adda, Hydrabad with a direction to retain her in the Home till she attains the majority or till further orders from the Court. The accused has been remanded to judicial custody and he is presently lodged in Sub-Jailo, Devarakonda. During the course of hearing, we summoned the alleged detenue from the State Home for Child Care Centre. She made a statement that she had studied up to 8th class, she was 13 years old and she had married 3rd respondent eight months before. Since the 3rd respondent was in custody and he was not represented, by an order dt. 12.12.2005 we ordered his production. He also accepted that he had married the alleged detenue. The alleged detenue Arpitha before this Court also stated that she was not ready to go with her parents.

In the light of these facts, the question before this Court is whether a minor girl claiming to have married can be allowed to join her husband or she can be forced to go with her parents or she be put in the State Home for Child Care Centre till she attains majority.

The learned counsel for the petitioner submits that since the alleged detenue is only 13 years old, therefore the petitioner is the rightful guardian of the child, notwithstanding any marriage and

notwithstanding legality of such marriage. In this case questions of far reaching consequences affecting the social order of the society are involved. Therefore we requested Sri V.L.N.G.K. Murthy, learned senior counsel to assist as amicus curiae. We also heard the learned Advocate General. In the light of the contentions and arguments, we will have to examine the law on the subject. We will first see whether the marriage as claimed by the alleged detenue and 3rd respondent is a valid marriage or not. Section 5 of the Hindu Marriages Act, 1955 (for short "the Act") lays down the conditions which must be fulfilled before the marriage was solemnized between two Hindus. One of the conditions contained in Section 5 (iii) lays down,

> "the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage."

Section 11 deals with void marriages and it lays down,

> "Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, (against the other party), be so declared by a decree of nullity if it contravenes any one of the conditions specified in clause (i), (iv) and (v) of Section 5."

Section 18 of the Act makes marriage, in contravention of the conditions specified in clauses (iii), (iv) and (v) of Section 5, of an offence and in case of contravention of condition (iii) of Section 5 the person who procures a marriage can be punished with imprisonment of fifteen days or with fine which may extend to one thousand rupees or with both.

Going by these provisions of law, a marriage solemnized in contravention of Section 5 (iii) of the Act is not a void marriage. Therefore there is nothing in the Hindu Marriage Act, 1955 which would make a marriage illegal if it is solemnized if the bride has not completed the age of 18 years. Although it is an offence under

Section 18 of the Act, but in our view, it does not make the marriage an illegal marriage.

Let us examine the position under the Child Marriage Restraint Act, 1929. “Child” is defined under Section 2 (a) as a person who, if a male, has not completed 21 years of age and if a female, has not completed 18 years of age. Child marriage is defined under Section 2 (b) as a marriage to which either of the contracting parties is a child. Then the Act provides for punishment to a male adult below 21 years of age marrying a child under Section 3. Under section 4 it provides for punishment to male adult above 21 years of age marrying a child. Section 5 provides for punishment for solemnizing a child marriage and Section 6 provides for punishment to parent or guardian concerned in a child marriage. Offences under the Act are made cognizable and there is a power to issue injunctions under Section 12 prohibiting marriage in contravention of the Act. This Act also does not make the marriage void even if one of the spouses or both the spouses are minors. Therefore the marriage contracted by a minor neither under the Child Marriage Restraint Act nor under the Hindu Marriage Act is void and nullity. We are fortified in our view by a judgment of the Supreme Court reported *Smt. Lila Gupta Vs. Laxmi Narain and others* . Justice D.A. Desai who wrote the judgment for himself and Chief Justice Chandrachud, at the beginning of the judgment, said,

> “A very interesting and to some extent hitherto unexplored question under the Hindu Marriage Act, 1955, arises in this group of six appeals”

In para-3 the question was framed,

> “Whether a marriage contracted in contravention of or violation of the proviso to S. 15 of the Act is void or merely invalid not affecting the core of marriage and the parties are subject to a binding tie of wedlock flowing from the marriage?

In paras 6, 7 and 8 the Supreme Court held,

"6. A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (*i*), (*iv*) and (*v*) of Section 5 only, void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of any one of them would be treated as a breach of a pre-requisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent on the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the face is that while a marriage solemnised in contravention of clauses (*iii*), (*iv*), (*v*) and (*vi*) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year had not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the Court of first instance. Such a marriage is not expressly declared void nor made punishable though marriage in breach of conditions (*i*), (*iv*) and (*v*) are expressly declared void and marriages in breach of conditions (*iii*), (*iv*), (*v*) and (*vi*) of Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision

prima facie would go a long way to negative any suggestion of a marriage being void though not covered by Section 11 such as in breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable.

7. Parliament while providing that a marriage in contravention of conditions (*i*), (*iv*) and (*v*) would be *ab initio* void which would mean that the parties did not acquire the status of husband and wife, comprehensively provided for its impact on a child born of such marriage. If any child is born to them before the marriage is annulled by a decree of nullity, indisputably such a child would be illegitimate but Section 16 confers the status of legitimacy on such children. A child born to parties who had gone through a form of marriage which is either void under Section 11 or voidable under Section 12, before the decree is made would be illegitimate; the law nonetheless treats it as legitimate even if the marriage is annulled by a decree of nullity and such child shall always be deemed to be a legitimate child notwithstanding the decree of nullity. Therefore, the Parliament was conscious of the fact that in view of the provisions contained in Sections 11 and 12 and its legal consequence a situation is bound to arise where a child begotten or conceived while the marriage was subsisting would be illegitimate if annulled because such marriage would be *ab initio* void. Look at the impact of a marriage in violation of proviso to Section 15 on child born of such marriage. Section 16 does not come to its rescue. If the marriage is to be void as contended the child would be illegitimate. A status of legitimacy is not conferred by any provision of the Act on a child begotten or conceived to a woman who had contracted marriage and the marriage was in contravention of the proviso to Section 15. No intelligible explanation is offered for such a gross discriminatory treatment. The thrust of these provisions would assist in deciding whether the marriage in contravention of proviso to Section 15 is void as was contended on behalf of the respondents.

8. Did the framers of law intend that a marriage contracted in violation of the provision contained in the

proviso to Section 15 to be void? While enacting the legislation, the framers had in mind the question of treating certain marriages void and provided for the same. It would, therefore, be fair to infer, as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in Section 5 each of the six conditions was not considered so sacrosanct as to render marriage in breach of each of it void. This becomes manifest from a combined reading of Sections 5 and 11 of the Act. If the provision in the proviso is interpreted to mean personal incapacity for marriage for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (*iii*) of Section 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a valid marriage is prescribed in condition (*iii*) of Section 5 it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if a marriage is contracted Section 11 does not render it void even though Section 18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nor does Section 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provide for it. Craies o n *Statute Law,* 7th Edn., P. 263 and 264 may be referred to with advantage:

"The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself

> is void ... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and *I have sought in vain or any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it* (emphasis supplied). . . . From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity."

In a similar case in *Shankerappa Vs. Sushilabai* a Division Bench of Karnataka High Court consisting of Justice Venkatachaliah and Justice K.A. Swami, relying on the judgment of the Supreme Court reported in *Smt. Lila Gupta Vs. Laxmi Narain and others* (1st supra), held that the marriage solemnized in violation of the conditions concerning age of eligibility of Section 5 (iii) would not be a nullity and such a violation is only made punishable under Section 18.

However, there are certain offences prescribed under the Indian Penal Code with respect to taking away a child even for marriage. Section 361 of IPC makes kidnapping of a female under 18 years an offence if she is taken from the custody of guardian without the consent of the guardian. Similarly if a marriage is performed, it can be presumed that sexual relationship will also develop and under Section 375 if a man has sexual intercourse with a woman with or without her consent under 16 years is rape. There is an exception to it that sexual intercourse by a man with his wife may not be an offence of rape if the wife was not under 15 years of age. In the present case the girl is 13 years, therefore the marriage by a minor would be contravening the various laws and the factum of marriage in itself would be an offence under various laws, but we do not agree that such marriage would be an invalid, illegal or null and void

marriage.

Now the question remains whether the girl who has married, according to her, 3rd respondent and who is not willing to go with her parents can be allowed to live with the 3rd respondent. In this connection, we can rely on the provisions of the Hindu Minority and Guardianship Act, 1956. This Act has an overriding effect under Section 5 which lays down,

> "5. Overriding effect of Act,- Save as otherwise expressly provided in this Act,-
>
> a. any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> b. Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

Minor is defined under Section 4 (a) as a person who has not completed the age of 18 years. Section 6 defines the natural guardians of a Hindu minor and it lays down that the natural guardians of a Hindu minor, in respect of his person and property would be the father in case of a boy or a unmarried girl and then it mentions other guardians who can be guardians after the father. Under Section 6 (c) it lays down that in the case of a married girl, the husband would be a natural guardian. So this Act in a way recognizes the marriages of minor girls. The Act deals with minors and mentions the husband as a guardian of a married girl. This itself conveys the intention of the legislature that for a married minor girl, guardian would be the husband. There cannot be any guardian for a

major under the Hindu Minority and Guardianship Act, 1956. Therefore the only meaning which has to be given to Section 6 (c) is that if a minor girl is married, her natural guardian is the husband.

The learned counsel for the respondents has placed reliance on an unreported judgment of the Delhi High Court in *Ravi Kumar Vs. The State* (WP (Crl.) No. 942 of 2005). It was dealing with the subject as to whether in the circumstances of the case the accused could have been charged of an offence of kidnapping. Therefore that judgment is not directly on the point which we are deciding in this petition. We have no option, but to allow this girl who is only 13 years old to go with her husband, but we feel that the legislatures have not done much to stop the child marriages which are a menace. We cannot expect healthy growth of the society if a child of 12 years is allowed to be married. There are so many Acts to which a reference has been given by us hereinabove, which make the child marriage an offence, but which do not make the child marriage a void marriage. Since the marriage which has taken place between the alleged detenue and the 3rd respondent is a valid marriage in the eye of law, though it may be an offence under various provisions of various statutes, yet the marriage cannot be nullified and under the Hindu Minority and Guardianship Act, 1956 the 3rd respondent becomes a natural guardian of the detenue. These directions we are giving with a heavy heart and reluctantly, but the existing law does not leave any scope for us to take a different view. It is for legislature to look into the serious issues. Let a copy of the judgment be sent to National Women Commission and also to State Women Commission.

Therefore the writ petition is disposed of with a direction that the girl be handed over to the 3rd respondent. No costs.

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WP NO. 24690 OF 2005:

In view of our judgment in WP No. 23910 of 2005, this writ petition is disposed of allowing the alleged detenue to go with her husband. No costs.

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BN J.

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SARJ.

Dt. 1.2.2006

NB:

LR copies to be marked.

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